

**MINUTES
CITY OF EDINA, MINNESOTA
BUILDING CONSTRUCTION BOARD
COMMUNITY ROOM
JULY 23, 2012
7:30AM**

I. CALL TO ORDER

Chair Sean Wenham called the meeting of the Edina Building Construction Board to order at 7:30 AM.

II. ROLL CALL

Members Present: Sean Wenham, Eric Strobel, Scott Busyn, Pete Simpson

Members Absent: None

City Staff Present: Chief Building Official Steve Kirchman, Environmental Health Spec Solvei Wilmot, Permit Tech Jackie Onischuk, Fire Chief Marty Scheerer

Guests: Applicant DeeDee Drays, Neighbors Martin and Dona Freeman (5537 Woodcrest Dr), Ann Marie Rogers(5541 Woodcrest Dr)

III. APPROVAL OF MEETING AGENDA

Meeting Agenda was approved as submitted.

IV. APPROVAL OF CONSENT AGENDA

A. Approval of Minutes

Member Strobel moved approval of the minutes of March 23, 2012 with member Busyn 2nd. All voted aye motioned carried.

V. COMMUNITY COMMENT

None

VI REPORTS/RECOMMENDATIONS

City Environment Health Specialist Solvei Wilmot noted that City Code 450.25 requires a fence around the pool at 5633 Woodcrest Dr and does not provide for a variance. The applicant, DeeDee Drays is looking at the creek as an alternate which would have to meet or exceed the fencing requirements. The creek bed itself when it is dry is not adequate enough to meet these requirements. Vegetation as a barrier can be trimmed, cut or die off and is not a substitute for fencing. Fencing on the neighbor's property does not complete the enclosure of the Drays property, someone can wander into this property. For these reasons Wilmot has denied the applicant's request to use Minnehaha Creek as a fence for her pool. Wilmot showed photos of the property which were included in the packet. These

photos were taken 2011 when the creek was low. When the building permit packet was submitted approved plans included the fence. Drays has now come back and wishes to not include the fence but to get approval for using the Minnehaha Creek as the fence line. Wilmot went on with more pictures explaining the issues relative to the request. Concerns of hers were life and safety issues on having children wandering into property when creek is low.

Member Simpson questioned if we have helped others in similar situations. Wilmot said no. Simpson asked about the boulders on property being considered as fencing. Wilmot said that it would not be considered as a fence because they are climbable. Simpson asked who had more authority over the Creek - the Watershed District or the City. Building Official Steve Kirchman noted that the Watershed District regulates the creek, and if they don't allow fencing a certain distant from the creek then the fence or some other method for surrounding the pool must be in place. The Watershed and City have different rules and he doesn't know which agency trumps the other in this case.

Member Strobel asked what the set back was from creek. Kirchman said typical setback is 50' for structures, but doesn't know if fences are considered structures by the MCWD. Chair Wenham asked if the City contacted MCWD. Kirchman said that we did not. Wenham noted that if we were to follow the code exactly, (on the enclosed survey) it would be the green line which would be her property line there would have to be 4' fence around the entire pool area but the fence can also be put around the entire property. Is there a rule on where fence can be put in relation to the creek? Wilmot said that it would be have to be around that whole area but could be just around the pool. Wenham asked if a 4' fence around the whole property would be acceptable. Wilmot said correct. Wenham asked if there was a rule to where the fence could go in relation to the creek? Wilmot mentioned that we do not have clarity on that. Strobel while looking at the survey with the red line as lot lines it is 15-20 feet from creek. Wilmot said that there would be an accurate survey in with the permit packet with correct survey lines. Drays said that the overhead is an accurate survey.

Member Strobel said that you could not put a fence along the creek because she does not own the property. Drays said no that it would cut through the middle of the backyard. Strobel asked if there was a barrier that is not on the Drays property back by the creek would that count? Because the edge of the creek is not on the property. Wilmot said that was correct. We (the City) look at it as the property owner's responsibility to apply fencing on her own property and since the creek is not her property she cannot use that. Strobel asks if there is any difference of concern between the feeder creek and the access points along that of the Minnehaha Creek? Wilmot said that any access point at any location of level to get into the backyard to have access to the swimming pool. Strobel said that it looks like it is easier to walk over the feeder creek then Minnehaha Creek, so if you put a fence across from the Freemans green fence straight across blocking the feeder through all the brush would it satisfy the requirements? Wilmot said that it does cover the rear yard of the property. Kirchman said he believes it may be adequate. You are here today to consider an alternate. Her alternate is the creek and whatever else is there. If that is adequate for you fine, if you think you want to add something to that, additional plants then that I believe that is OK. Kirchman pointed out different areas of where her fence could go. As long as someone can't get to the pool without crossing a 4' fence or its equivalent. Strobel said that we can't relieve the homeowner of the requirements of the ordinance is but what we can do is approve other materials in lieu of a fence. And so the ordinance specifically allows other materials approved by the Building Official and we can advise the Building Official to approve different materials. So if we think grass is equivalent to a non-climbable fence, we could approve this. Member Busyn asked if we have ever granted someone else in this situation for not having a fence. Wilmot said no. Busyn noted that the neighbor has a fence, so we've never had an alternative fence approved? Wilmot said that as you have

indicated the neighbors do have a fence which is on an elevated property and they have a wall and it is considered a non-climbable, 4' high fence. Member Simpson questioned that if there were another set of rocks that surrounded the pool and came to 4' would that be acceptable? Wilmot said that the boulders she felt would not be acceptable as they were climbable. Simpson noted that in the report the City first approved it and then did not approve why was that? Wilmot said it was first an inquiry without a permit submittal and was discussed with Kirchman to have an alternative fencing. It was not approved at that time for we did not have a permit application with plans and survey. Busyn noted that there was a letter forwarded to her. Wilmot said that after the permit and plans were received was when we did not approve the use of the creek. Strobel asked that when we say non-climbable, non-climbable by who? He went on to read the ordinance in saying it's an 11 gauge woven wire mesh material that's what the definition of non-climbable is.

Members moved to the aerial photo. Member Simpson pointed out he couldn't get across the creek at his height. Came by side area and would rather go cross over the creek area. It's a fairly good size moat in the back. Also on the aerial it was pointed out where the side area (feeder) was from the Minnehaha Creek area. Simpson noticed that the side creek is over grown in the winter time that might not be as bad and not quite a threat at that time and hopefully there would be a cover on the pool.

Chair Wenham said that he thought a young child would not wander across the creek but could wander through the feeder creek area. He walked through there and it was not a pleasant experience. He saw three barriers in question, the creek on one side, the feeder which is very, very dry and the access through the brush behind the neighbor's fence. And do all provide sufficient barriers to children wandering through? In his opinion, yes. Does it satisfy the requirements of the code, no. But that is why we are here is to decide. Are the 3 areas acceptable?

Member Strobel wanted to know if we were aware of anytime previously where the City has denied a similar application where a property owner wanted to use the creek as a barrier. Wilmot said there were no other requests but would like to take a moment to point out that we look at the property owner as the responsible party and for you to consider park land as an acceptable alternative does not relieve the property owner of their responsibility.

Member Strobel asked if we instructed the homeowner to maintain a vegetation fence along the creek and then the city or whoever owned the property came along to cut it down the homeowner would not be able to stop it. Wilmot said that is correct. They can only manage what is on their property.

Member Busyn noticed a rain garden. Drays said that was a requirement for the pool. Busyn wanted to know if they also asked for a wetland buffer? Kirchman said no, the rain garden area it was simply to replace the fill that she put in the area regulated by the MCWD. Simpson asked if there was a letter from the Watershed District allowing a berm near the creek would that satisfy the requirements. Busyn said that they would make you dig another hole for flood issues.

Drays mentioned that the Watershed District has asked her to be part of the creek preservation program which is meeting on Friday. They are designing what they want to do in the tall grass and what they want to do is to build it up and plant native grasses because there is erosion that is happening along the creek and the native grasses/plants and rocks that they put up there root better and help prevent erosion from going into the creek so I have to sign an affidavit that says I will maintain it and continue to keep it that way because it is provided for the property owners at no expense. And they do have to get my permission, they can't do it without my permission even though some people in here say

it is creek property they consider it my property. And if I am in the program I have to maintain it for as long as I am in that home. She went on to mention that she did measure the depth of the creek from the bottom of the creek to the top of the grass not just the water line but there is a steep bank you have to climb up and at the low point it was 4'8" so it is higher than 4' because people cannot walk on water so it does meet the 4' requirement as an alternative. Strobel asked what she meant when she said top of grass? Drays explained that the creek water in Oct 2011 was at an all-time low it was between 18-20" at its lowest point and with weeds that a small child would not be able to navigate through but from the low water level you still have several feet of the creek bank to get into my yard which is over 4'. This is a point that should not be overlooked.

Member Simpson asked what the insurance company says? Drays said that they are fine with side yard fences. They consider the creek and feeder creek to be barriers. Minnehaha Creek Watershed District said it has always been considered a barrier for purposes of fence requirements. They do not want to see fence along the creek. To me the process has been really frustrating when I hear at the beginning of the meeting that alternatives could have been purposed along the way. Property laws are entirely different from where I moved from. Did not realize all the "red tape" needed to build the pool and also home. The process of building the pool was a lot of interaction between myself, a surveyor, who I paid thousands of dollars, the Watershed District and the City. It was quite a process. I don't know at some point who had authority over what because everybody needed to work together. But at all times the Watershed was clear that the creek was a barrier and it wasn't until the bitter end of this planning that on August 28 from Solvei I was told the creek is not an acceptable barrier and then met with Kirchman on September 23 in his office. In order to get my permit Solvei came to the site and changed her mind that now I have to fence something that I never planned to fence during this entire design process and being told the creek is a natural barrier. So really frustrating that if I was told to put boulders 1 foot higher than the boulders you selected you would be fine. Do this or do that it would have been really good to know.

Member Strobel asked when was the pool put in? Drays said that the pool was started last fall and wasn't finished until end May beginning of June of this year. Nothing was started until final approval plan of the pool. But the plan there had been months and months of planning of the design, location the shape of the pool, had she known that the creek was not a natural barrier I would of loved to of had open dialog, where someone would of said to me, we are not going to take that position anymore and it is not going to be a natural barrier. But the City and Watershed very much work together on this process and all along the creek tells me no you are not allowed to put a fence up along the creek, we don't want a fence on the creek the creek is a natural barrier and so now I have 2 ½ to 3 foot high boulders. Had I known that I would of selected 4 foot tall. Strobel asked when was the pool permit approved? Drays said it was September 23, after I had to changed things from Solvei's letter. Simpson asked if there were City inspectors on the property before September. Drays said that Solvei came in September. Simpson asked when did you file for the permit? Drays thought it was in June. Simpson then said the permit was put in on June and no one from the City appeared on the property until September? Drays said that was correct, which is frustrating because a lot of planning goes into it, from looking at the site, there is no requirement to fence in my entire yard there is a requirement to just fence in my pool. This pool based on so many different variations, such as setbacks, you're going to dig a hole and hit a spring from the creek and it is going to lift the pool out of the water. The nonsense that was encountered, I could keep you here for a long time. So I shrink down the pool to half the size of the pool that I originally had hoped for. It doesn't connect to two points of the house. One side of the pool (overhead) connects to the house where the other side where a fence would have to enclose it would attach to an open air patio. I would of liked to of had pool the length of the house, put a fence around it but that is not an option.

Drays went on to show where she thought the fence would have to go. It's really frustrating hearing alternatives. Someone from the City could have been to my house many, many months. This process went back and forth. Steve could probably show you how thick the file is and how many surveys I had. All this happened before the pool permit was issued. Then to find out September 23, "oh guess what, we never mentioned this before, and now we are changing what we told you in August and now what the creek has told you all along you can't rely on.

Member Strobel questioned if the letter you received September 23 from Wilmot was received after your pool design was already finalized based on side yard fencing and was about to submit it for issuance of my pool permit. Drays explained that she was trying to get her pool permit issued, she had applied many, many months before, permit couldn't be issued, Kirchman said I should apply for the permit showing a fence and appeals later. Strobel wanted to know, if as of September 24, was there a hole in the ground?

Drays: No

Strobel: So, by the time you found out that the City was not going to allow you to proceed you had not done any construction.

Drays: No construction.

Strobel: So you proceeded with construction of the pool and the design that you chose knowing that it wasn't going to be approved

Drays: Knowing that I had a really great chance at winning this.

Strobel: You knew it had not been approved

Drays: Correct. So the side yard setback, I have 2 young children and went to great expense, and my pool company will tell you how complicated it was to do a pool cover with the corners. The pool cover can withstand adults walking on top of it and when I am not at home that pool cover is on all the time. The side yard fences, the Freemans are here (5537 Woodcrest) who have lived much longer than me (18 years), I have never had a child enter my property from the creek, never even seen one – you would have to give your child a machete for them to go through this.

Wenham: Let's have the Freemans talk, and let's keep in mind that young children would move into the neighborhood as well. We have to cover our bases.

Mr. Freeman: I spend a huge amount of time in the back yard and sometimes get across the feeder creek it is a chore. I do wild life photography and in the 18 years I've lived there I have not seen kids or anyone wander in off the creek you really have to work at it.

Mrs. Freeman : It might be worth mentioning that on the other side of the feeder creek is Pamela Park, and is a wilderness and from there to 58th St is brush, weeds, cattails, pond. The pond that is open to the street.

Mr. Freeman: Actually you go across the feeder pond and there is a fairly large pond with a muddy bottom and if you are concerned with drowning risks someone wandering into something Pamela park is full of

those things and that is what we are next to. It just seems to me that just getting across the creek or feeder creek and navigating around the swampy pond can go from anything from muddy residue to over flowing in a rainy time. Can vary a lot and quickly. There are so many natural hazards around there. My perception is the side yard fence that the real risk is people coming off of the street and right now there is no barrier to that. The side yard fence would accomplish that. If you go there and look, which I know a few of you have, and you look at the big picture that the hazards are really everywhere and apparent to the topography of the park and creek which is why we moved there. It is not easy to get through.

Drays: There are no requirement to fence the whole yard that's clear. What is the alternative fencing around the pool? Side yard fencing would prevent children from drowning in the pool as well as the creek. Putting a side yard fence in would prevent children from coming in, I don't understand why that wouldn't be a solution where now you have a home that protects children from drowning in the pool and drowning in the creek.

Wenham: It's not your intentions are really in question here right?

Drays: But there are no requirements that I do a whole yard, either we fence the pool or do side yard fences. I understand this and if this is really the issue, I would be happy to do put fencing to close this off.

Strobel: You can't

Wilmot: The City of Edina owns right there.

Wenham: While I was there, there was the old concrete bases from other fence posts from a long time ago it was part of a chain link fence it had been grown through and married to the buckthorn that had grown into it but it was not connected all the way up (pointed to the bottom corner or property picture.)

Drays: This is supposed to be the City of Edina's easement, this meets 4' alternate, you go from the bottom of the creek to where my yard starts you have 4' and higher, and this is actually pretty deep also The water is not deep the ditch this is very dry and often doesn't have flowing waters.

Busyn: Why don't you want to put a fence around the pool?

Drays: Because working with the watershed it kept shrinking smaller, smaller in size where originally before I knew setbacks, springs popping up it was going to be much larger it would be more connected to the house.

Busyn : You didn't want to just put a fence around the perimeter of the pool?

Drays: No there is no logical point for it to connect to the house. It's open. She showed on the survey pictures why it would not work. If I had known I would of picked 4' boulders but you still need some type of access point down I still feel that the side yard fences are such a simple dual protection, protecting children from pool and creek. Minnehaha Creek has always been considered an acceptable barrier for fence purposes.

Wenham: A asked for any more community comments.

Ann Marie Rogers: who lives at 5641 Woodcrest Dr is here to support Drays and thinks the side yard fence would be adequate.

Wenham: Asks Drays if she is done and any questions for her, Any thoughts on solutions?

Simpson: I have read the code and one of the things that bothers me about black and white codes and black and white interpretation is the City of the Edina. It is very, very important that we protect the people but I also now we have to be realistic about it. When I walked the property I didn't realize how deep the creek was. It's very difficult to get across and to me it is a very formidable barrier. Second thing is the side creek there is a swamp on the other side and if the City might grant permission to put the fence back up. I saw those rocks and it is an effort to get up them. I think we have a barrier on the creek, and barrier if a fence put back up. I think we really protect the intent of the law and maybe not the letter of the law.

Wenham: So you would be comfortable the way it is?

Simpson: Yes, with the side fencing and the City of Edina letting her add to that fence and the side creek. Adding some fencing down to the feeder creek. Walking around the pond in Pamela Park is a swamp.

Strobel: There is a trail around Pamela Park over by the feeder. You can cross the creek with easy access. It is not a steep bank it is a gradual sloop. It would be easy for a 6 year old to cross over. Members examined overhead pictures showing where the trail was and the easy access to Drays property for a child. Concerned about people accessing an attractive nuisance. You can't pick a better spot than Pamela Park for a little child to come in and screw around. It's easy to get into the Drays yard.

Drays: I know where you are talking about and those branches are about 25' from where the actual land ends. The overhanging branches were in the way for kayaks.

Strobel: These are not overhanging branches, these are branches lying in the creek bed.

Drays: Went to overhead and went to show where the branches were in relation to her property the property.

Strobel: At the overhead he showed the area he was referring to and pointed out that they were 2 feet from property line. So it is not 60' from property, and it is less than 10' from the trail.

Ann Marie: Mentioning that is very hard to navigate through all the brush. We don't see kids back there.

Strobel: You can see the trail head from Drays property. I don't think you can see it from your property(Rogers). In fairness across the creek from your property it is very much more dense then the Drays property.

Wenham: What is your suggestion?

Strobel: Minnehaha Creek is a barrier, but the feeder creek is not. It is an attractive nuisance that draws kids, not keeps them away. If you can put a fence across to block from the feeder creek to the edge of Minnehaha Creek behind the tree that is on the corner of your property and do side yards I would be far less concerned about kids accessing the pool.

Solvei: what I am hearing is that you are putting responsibility to the City of Edina to provide fencing for her pool on what is City land.

Drays: I could put it in at my expense

Strobel: Went on showing where he thought the fencing should go

Drays: Showed where her trampoline was which is City property, doesn't know at what point the City easement is pertaining to creek. Would need City permission to put up a fence in feeder area.

Strobel: So the side fence is good and even a 4' wall on the creek side doesn't provide an entire barrier around the pool. The reality is you just have to walk up to the deck to get into the pool you need some barrier.

Busyn: I empathize with the applicant. It would of been great to come up with a solution for the wall. I don't think it is the City's responsibility to do design, it is up to your contractor. I walked the property and it's was pretty manicured with low vegetation 6" tall. At the house is there was an open spot. I don't think you should rely on the grasses as a barrier. It's not permanent, it dies in off in fall, new homeowners mow down to the creeks edge, I've build new homes on the creek and have seen people mow right down to the water's edge. I'm concerned about the grasses being considered a fence and the fact the 4' barrier being the creek bed is also variable over time. When creek goes up boaters would have access to property. The Creek could dry up and provide access that way. These are over the course of time that is why the codes are written, to prevent the maybe unlikely scenario. I'm concerned about the creek being the barrier, I do think there is a way to put a fence that is attractive to you.

There was discussion between Busyn and Drays on ways to fence off her property.

Busyn: I would like to see fence around the pool

Wenham: I did not go across Pamela Park and see the vulnerable area along the feeder creek. If a child is going to wander and have a drowning accident it is going to be in the creek not the pool. I believe that the creek provides a barrier, the feeder creek is the only vulnerability that I see and whether it's a fence or some other format it needs to be taken in consideration. The City is not required to fence all the ponds here as well to prevent a child from wandering. My solution is to have more discussion on what we do around feeder creek. I would accept Minnehaha Creek as a barrier knowing that there are sideyard fences on both sides. Something in that bottom section needs to be done. I think it is in our interest to make recommendations for how to do that. We are also a city of residents who are taxpayers, and we have to make sure those are the true customers of the city and protect the children.

Wilmot: I still have concerns. It was brought to our attention that where the property line is and we are relieving the property owner of the fencing requirements because we are having the park land act as part of her fencing. I am concerned about the property line with the code.

Wenham: We are not making a judgment right now. We are making a recommendation and discussion and we will have to put together our complete recommendation. Will we do that today Steve?

Kirchman: We are at the point now where a motion can be made and hopefully seconded and then there will probably be more a little more discussion to massage the motion, make changes to the motion to make sure everyone is OK with the motion and then you vote on it. If it passes fine if not make another motion.

Wenham: I will make two motions. First is to support the Minnehaha Creek as a barrier and the second is how to deal with the bottom piece the feeder. I would like to make a motion to accept Minnehaha Creek as an appropriate boundary along that line of the property with the consideration of the side yard fences are installed.

Second: Simpson, Aye: Strobel, Nay: Scott

Wenham: My second motion would be that we defer for the moment the recommendation on that bottom piece until we all have had a chance to go out and visit Pamela Park and see it again from a pretty important perspective that Member Strobel saw and be able to come back and make a judgment that we think a fence should be installed or not and how that fence would work since it is City property not Drays property.

Strobel: So I think the appropriate motion is to table consideration of the solution to the SE quadrant of the property for further discussion at another meeting pending two points. One, we need clarity of the property line and the City of Edina interest as opposed to the Watershed's interest in that piece property and then pending adequate survey by the members I would move to table that consideration until a future meeting.

There was discussion on getting an accurate survey.

Strobel: Wants to know who controls that ou lot.

Kirchman: Went to overhead to clarify what was accepted and what needed at the future meeting.

Wenham: Asked if Kirchman could find out who owns that piece of property by the feeder creek.

Strobel: Tabled the motion until our next meeting.

There was discussion about the orange fencing that is up right now and where Drays can place it. Question was if we would accept a construction fence by the feeder creek until that question is resolved.

Wenham: Once the side fences are in can the orange fencing go up along the creek, but not before.

Strobel: If the City or Watershed says no you cannot fence on the SE border where does that put us?

Kirchman: You have accepted the creek as the barrier. If Drays can't provide a barrier around the pool because the City or MCWD won't let her put a fence up at SE corner she is really back at square one as to complete the rest of the barrier. Your motion is to accept the creek as a barrier really gets her only

part way there, but she should realize that it doesn't get her all the way there. The feeder creek section of the barrier still has to be resolved. If it can't be resolved by some type of fence she will have to put a fence somewhere else.

Strobel: For clarity you should have an amendment to the motion clarifying that the feeder creek is not an acceptable barrier. Minnehaha Creek is an acceptable barrier but feeder creek is not.

There was more discussion on where the temporary orange fence can go. Kirchman went up to the overhead to point out where acceptable areas for the temporary orange fence.

Wenham: All in favor to the amendment to the motion

Ayes: Strobel, Simpson, Busyn

Strobel: The amendment is the Minnehaha Creek will be accepted as an alternative under section 450.25 for the fencing requirements. The feeder creek would not satisfy the requirements under 450.25.

Second: Simpson, Ayes: Wenham, Nay: Busyn

VII. **CORRESPONDENCE AND PETITIONS**

None was received

VIII. **CHAIR AND BOARD MEMBER COMMENTS**

Member Simpson would like to see senior management review through this entire process from a to z It concerns me as a resident of Edina that we are in a reactive mode with the city staff. We pay top dollar for the expertise of City staff and they see a hundred lots a year with this kind of stuff. I would like to have staff go through and to give options.

Chair Wenham said that have opportunities to do that now that we have an annual meeting scheduled.

Member Simpson would like to see why it took June to September to get the Drays plans accepted.

IX. **STAFF COMMENTS**

No Comments

X. **ADJOURNMENT**

Chair Strobel motioned to adjourn, Member Busyn 2nd. All voted aye Motion passed.

Adjournment at 9:00 am